

This Opinion is Not a  
Precedent of the TTAB

Mailed: April 25, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Pa+hfinder, LLC*

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Application Serial No. 90338230

Courtney Thompson of Fredrikson & Byron PA for Pa+hfinder, LLC.

Ellen J.G. Perkins, Trademark Examining Attorney, Law Office 110,  
Chris A. Pedersen, Managing Attorney.

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By the Board:

On April 11, 2023, the Board issued a final decision in this proceeding which omitted a phrase from Applicant's International Class 43 services appearing on pages 1-2, 11, and 17. This error has been corrected.

Attached is the corrected version of the April 11, 2023 decision.

The time for filing a request for reconsideration, an appeal, or commencing a civil action continues to run from the April 11, 2023 mailing date of the Board's original decision. *See* Trademark Rule 2.145(d), 37 C.F.R. § 2.145(d).

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Before Greenbaum, Dunn, and Allard,  
Administrative Trademark Judges.

Opinion by Dunn, Administrative Trademark Judge:

Pa+hfinder, LLC (“Applicant”) seeks registration on the Principal Register of the  
mark IMAGINE (in standard characters) for:

Education services in the nature of early childhood instruction; providing information about early childhood education; providing information relating to educational and entertainment activities and events for children during early childhood; provision of play facilities for children during early childhood; all of the foregoing provided in person at physical facilities and excluding public, independent, and charter schools at the K-12 grade levels and materials related thereto, in International Class 41.

Preschooler and infant care at daycare centers, all of the foregoing provided in person at physical facilities and excluding public, independent, and charter

schools at the K-12 grade levels and materials related thereto, in International Class 43.<sup>1</sup>

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as applied to the services identified in the application, so resembles the standard character mark IMAGINE SCHOOLS (SCHOOLS disclaimed) on the Principal Register for the services listed below as to be likely to cause confusion, to cause mistake, or to deceive.

Providing educational services by providing courses of instruction at public, independent, and charter schools at the K-12 grade levels; development and dissemination of educational materials of others in the fields of mathematics, history, language arts and other subject matters all for students in grade levels K-12, in International Class 41.<sup>2</sup>

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

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<sup>1</sup> Application Serial No. 90338230 filed November 23, 2020, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant's claim of first use anywhere and use in commerce since at least as early as March 8, 2020 for both classes of services. The International Class 43 services include other services that are not the subject of the refusal, namely "Cafeteria services; Restaurant and café services; all of the foregoing provided in person at physical facilities and excluding public, independent, and charter schools at the K-12 grade levels and materials related thereto."

<sup>2</sup> Registration No. 3230467 issued April 2, 2007, renewed.

The Trademark Status and Document Retrieval (TSDR) citations refer to the downloadable .pdf version of the documents available from the electronic file database for the involved application. The TTABVUE citations refer to the Board's electronic docket, with the first number referring to the docket entry and the second, if applicable, the page within the entry.

## I. Evidentiary Issue

With its appeal brief, Applicant submitted for the first time a TSDR copy of its recently-issued Registration 6696592 for a related mark for the same services.<sup>3</sup> The Examining Attorney did not object to the new evidence but did not refer it in her brief.

Trademark Rule 2.142(d) provides that “[t]he record in the application should be complete prior to the filing of the appeal. Evidence should not be filed with the Board after the filing of a notice of appeal.” 37 C.F.R. § 2.142(d); *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018) (“The evidence submitted with Applicant’s appeal brief that Applicant did not previously submit during prosecution ... is untimely and will not be considered.”), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019).<sup>4</sup> Because the registration is untimely and the Examining Attorney did not treat the new evidence as of record, we have not considered it.

## II. Likelihood of Confusion Refusal

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357,

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<sup>3</sup> Consideration of Registration No. 6696592, for a mark with a design element and additional wording and so less like the registered mark than Applicant’s mark IMAGINE in standard characters, would not have changed the result we reach here. Each application stands on its own record. *In re Boulevard Entm’t., Inc.*, 334 F3d 1336, 67 USPQ2d 1475, 1480 (Fed. Cir. 2003).

Applicant also submitted with its brief TSDR copies of its application and the cited registration, which are already of record.

<sup>4</sup> If Applicant wished to introduce additional evidence, its recourse was to file a written request with the Board to suspend the appeal and remand the application for further examination. 37 C.F.R. § 2.142(d); *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE § 1207.02 (2022).

177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument. See *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the goods or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Here, whether or not the record includes any evidence pertaining to the *DuPont* factor, Applicant contends that each of the thirteen factors “weighs in favor of finding no likelihood of confusion.”<sup>5</sup> However, there is no requirement that each factor must weigh in favor of Applicant or Registrant. See *Stratus Networks, Inc. v. UBTA-UBET Comm’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341 (Fed. Cir. 2020) (“While the Board is required to consider each *DuPont* factor for which it has evidence, the Board ‘may focus its analysis on dispositive factors, such as similarity of the marks and relatedness of the goods.’”). Accord J. Thomas McCarthy, 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION 24:43 (5<sup>th</sup> ed) (“The *DuPont* multi-factor analysis is merely a guide. It does not involve a mathematical adding up of factors pro and con to decide if confusion is likely.”).

Where, as here, there is no evidence of actual confusion, use by Registrant on a variety of goods, Registrant’s right to exclude other users, or any market interface between Applicant and Registrant, we find *DuPont* factors seven, eight, nine, ten,

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<sup>5</sup> 4 TTABVUE 11, 13, 14, 16, 17, 18.

eleven, and thirteen to be neutral.<sup>6</sup> See *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (“In its likelihood of confusion analysis, the TTAB considered the first three *DuPont* factors, treating the rest as neutral because neither party submitted evidence related to them.”); *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1164 (Fed. Cir. 2014) (“The Board properly determined that the first four *DuPont* factors weighed in favor of finding a likelihood of confusion and that the remaining factors were neutral.”).

We turn to the evidence and arguments on the remaining *DuPont* factors.

#### **A. Strength of Registered Mark/Comparison of the Marks**

We first address the strength of the registered mark IMAGINE SCHOOLS. See *In re Morinaga Nyugyo K.K.*, 120 USPQ2d 1738, 1745 (TTAB 2016) (“[T]he strength of the cited mark is — as always— relevant to assessing the likelihood of confusion under the [*DuPont*] framework.”). As a registered mark, it is presumed to be distinctive. See *New Era Cap Co. v. Pro Era LLC*, 2020 USPQ2d 10596, \*10 (TTAB 2020) (“Opposer’s mark is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act.”). In assessing the mark, we may consider dictionary

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<sup>6</sup> Applicant argues (4 TTABVUE 18) that its prior Registration 6696592 and pending Application Serial No. 90338245 demonstrate its right to exclude other users. There is no evidence of the pending application in the record and, as set forth above, the registration was only submitted with Applicant’s brief and will not be considered. Applicant’s registration and application do not demonstrate a right to exclude others from use of IMAGINE because they involve different marks. Applicant also argues (4 TTABVUE 19) that the restriction of its recitation of services to exclude the registered services should be considered under the catchall *DuPont* factor thirteen. We discuss the restriction in connection with *DuPont* factor two, assessing the similarity of the services.

definitions “to determine the ordinary significance and meanings of words.” *Hancock v. Am. Steel & Wire Co. of N. J.*, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953). Here, the term “IMAGINE” is defined as the verb “to form a mental image of (something not present)” and the term “SCHOOLS” is the plural form of the noun defined as “an organization that provides instruction: such as: an institution for the teaching of children.”<sup>7</sup> The term SCHOOLS appears in the recitation of services for the cited mark, was disclaimed, and we find it is generic as applied to the services. *See In re Johanna Farms, Inc.*, 222 USPQ 607, 609 (TTAB 1984) (“The term ‘yogurt’ is concededly the name of the goods. That fact is uncontrovertible where, as here, the same term has been used in the identification of goods for which registration is sought.”).

In contrast, the initial term IMAGINE suggests a quality of the educational services, and so we find the mark IMAGINE SCHOOLS to be suggestive overall. Even with the finding that Registrant’s mark is suggestive, it nonetheless remains inherently distinctive as applied to the services identified in the registration. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000) (word marks that are arbitrary, fanciful, or suggestive are “held to be inherently distinctive.”). As a result, it must be accorded at least the normal scope of protection to which all inherently distinctive marks are entitled. *In re Great Lakes Canning*,

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<sup>7</sup> *Merriam-Webster.com Dictionary*, <https://www.merriam-webster.com/dictionary/Imagine> and [/school](https://www.merriam-webster.com/dictionary/school). Accessed Apr. 6 2023. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

*Inc.*, 227 USPQ 483, 485 (TTAB 1985) (“[T]he fact that a mark may be somewhat suggestive does not mean that it is a ‘weak’ mark entitled to a limited scope of protection.”).

The scope of protection that is accorded a mark based on its strength may narrow with proof of third-party use demonstrating weakness in the industry or third-party registrations demonstrating that a term has a normally understood and well recognized descriptive or suggestive meaning. *See Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674-75 (Fed. Cir. 2015). Applicant relies on 13 third party registrations, based on use in commerce, for the ten standard character marks IMAGINOOK, IMAGINGO, IMAGINE U, IMAGINE THAT!!!, IMAGINE A PLACE, IMAGINENATIONS, IMAGINE IT! THE CHILDREN'S MUSEUM OF ATLANTA, PROJECT IMAGINE! KINDERMUSIK IMAGINE THAT!, and three composite marks shown below for educational services for K-12, or educational services at an unspecified academic level, which are presumed to include K-12.<sup>8</sup>

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<sup>8</sup> November 17, 2021 Response TSDR 81-137. We do not find marks registered based on foreign registrations relevant to the strength of the mark for U.S. consumers. November 17, 2021 Response TSDR at 91-94, 106-109. *See Calypso Tech. Inc. v. Calypso Capital Mgmt. LP*, 100 USPQ2d 1213, 1221 (TTAB 2011). Because the services differ, we do not find relevant the marks for college education, fitness instruction, daycare centers, publishing, or entertainment services. November 17, 2021 Response TSDR at 98-100, 117-128, 135-137. *See [In re Thor Tech Inc.]*, 90 USPQ2d 1634, 1639 (TTAB 2009).

Applicant also includes TESS summary results of the search for registered IMAGINE marks for services in International Classes 41 and 43. *Id.* at TSDR 75-80. We give this evidence little, if any, probative weight because the full recitations of services are not included and so Applicant has not shown that the marks are applied to services similar to the registered services. *See Devivo v. Ortiz*, 2020 USPQ2d 10153, at \*13 n. 46 (TTAB 2020). *See also In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (“Classification is solely for the ‘convenience of Patent and Trademark Office administration,’ and ‘is wholly irrelevant to the issue of registrability under section 1052(d)’”) (citations omitted).



We acknowledge that each third party mark includes the literal element IMAGINE or IMAGIN. The composite marks have several additional elements, both literal and design. The standard character marks IMAGINOOK, IMAGINGO, and IMAGINENATIONS join IMAGIN and IMAGINE with literal elements which contribute to overall commercial impressions of coined terms. Similarly, IMAGINE THAT!, IMAGINE IT, IMAGINE ME and IMAGINE A PLACE all evoke phrases with different commercial impressions than the common dictionary term IMAGINE. The remaining marks IMAGINE U and PROJECT IMAGINE are too few in number to demonstrate a well recognized suggestive meaning in the education field. *Compare Juice Generation* at 1675, *citing Anthony's Pizza & Pasta Int'l, Inc.*, 95 USPQ2d 1271, 1278 (TTAB 2009) ("The testimony, third-party registrations, and telephone listings are sufficient to show that the name 'Anthony's' has been extensively adopted, registered and used as a trademark for restaurant services, in particular for Italian restaurants and pizzerias, and therefore that 'Anthony's' has a significance in this industry. ... As a result, a mark comprising, in whole or in part, the name 'Anthony's' in connection with restaurant services should be given a restricted scope of

protection.”). In sum, the record does not support restricting the normal scope of protection accorded the inherently distinctive registered mark IMAGINE SCHOOLS.

We compare Applicant’s mark IMAGINE and the registered mark IMAGINE SCHOOLS, both in standard characters, “in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). The marks “must be considered ... in light of the fallibility of memory.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)). The proper focus is on the recollection of the average consumer, who retains a general rather than specific impression of the marks. *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Here, the average consumer is anyone in the general public concerned with the care and education of children.

Because SCHOOLS is generic and disclaimed, we find the term IMAGINE forms the dominant part of the registered mark IMAGINE SCHOOLS as well as the entirety of Applicant’s mark. Due to the dominance of IMAGINE in Registrant’s mark, we find that Applicant’s IMAGINE mark and Registrant’s mark IMAGINE SCHOOLS are similar in sound, appearance, meaning, and create the same commercial impression when applied to educational and daycare services.

In view of the foregoing, we weigh the *DuPont* factors concerning the strength of the prior mark and the similarity of the marks heavily in favor of finding likelihood of confusion.

**B. Similarity of the Services, Trade Channels, and Conditions of Purchase**

We next compare the services under the second *DuPont* factor. In making our determination regarding the relatedness of the services, we must look to the services as identified in Applicant's application and the cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 110 USPQ2d at 1162 (quoting *Octocom Sys., Inc. v. Hous. Computs. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods [or services] set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods [or services], the particular channels of trade or the class of purchasers to which the sales of goods [or services] are directed.")). Moreover, registration must be refused in a particular class if Applicant's mark for any of its identified services in that class is likely to cause confusion with Registrant's mark for any of its identified services. *See Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods or services in the application).

As stated, Applicant seeks to register its IMAGINE mark for "education services in the nature of early childhood instruction; providing information about early

childhood education; providing information relating to educational and entertainment activities and events for children during early childhood; provision of play facilities for children during early childhood; all of the foregoing provided in person at physical facilities and excluding public, independent, and charter schools at the K-12 grade levels and materials related thereto” and “preschooler and infant care at daycare centers, all of the foregoing provided in person at physical facilities and excluding public, independent, and charter schools at the K-12 grade levels and materials related thereto.” The cited IMAGINE SCHOOLS registration lists “providing educational services by providing courses of instruction at public, independent, and charter schools at the K-12 grade levels; development and dissemination of educational materials of others in the fields of mathematics, history, language arts and other subject matters all for students in grade levels K-12.”<sup>9</sup>

Applicant contends (4 TTABVUE 19) that the restriction of its recitation of services to exclude the registered services means that “As such, there is no overlap or relatedness between the services.” We disagree; because of the many ways in which consumers are exposed to marks, it is difficult to fashion amendments to the recitation of services which meaningfully restrict how the relevant public may encounter or perceive the mark. *See, for example, In re i.am.symbolic, llc*, 866 F.3d

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<sup>9</sup> We take judicial notice that the letter K, used in the recitation of services for the cited registration, is an abbreviation for “kindergarten,” and the term “kindergarten” is defined as “a school or class for children usually from five to six years old.” *Merriam-Webster.com Dictionary*, <https://www.merriam-webster.com/dictionary/k> and kindergarten. Accessed Mar. 31 2023. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d at 1229 n.4.

1315, 123 USPQ2d 1744 (Fed. Cir. 2017) (affirming Board finding that an identification restricting the goods to those “associated with William Adams, professionally known as ‘will.i.am,’” imposed no meaningful limitation on the nature of the goods or the trade channels or classes of purchasers of the goods); *In re Yarnell Ice Cream, LLC*, 2019 USPQ2d 265039 (TTAB 2019) (“notwithstanding the limitation that the goods are marketed by a mascot named Scoop at product promotions and distributions, we must assess the registrability of Applicant’s proposed mark for ‘frozen confections and ice cream’ consumed by members of the general public.”) and *Bd. of Regents, Univ. of Tex. Sys. v. S. Ill. Miners, LLC*, 110 USPQ2d 1182, 1190-93 (TTAB 2014) (finding that although opposer’s clothing items were limited by the wording “college imprinted” and the applicant’s identical or highly similar items were limited by the wording “professional baseball imprinted,” these restrictions did not distinguish the goods, their trade channels, or their relevant consumers in any meaningful way).

Preschool and kindergarten education services both appeal to young children, and are inherently related. *See Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (“While additional evidence, such as whether a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis, the Board did not consider the important evidence already before it, namely the ITU application and HP’s registrations.”).<sup>10</sup>

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<sup>10</sup> The excerpts from Applicant’s and Registrant’s websites corroborate the close relationship in preschool and kindergarten educational services, with Applicant’s website stating “Imagine Early Education is proud to offer a wide variety of programs for children ages 6 weeks to 13 years” (November 17, 2021 Response TSDR 33) and Registrant’s website stating

While the registered K-12 educational services do not share the same purpose with Applicant's infant and preschool daycare center services, we find that the different services are closely related because they may be used sequentially by the same parents and guardians for the same children. The parents and guardians who first use preschool and infant daycare services for their children may next need kindergarten and early elementary educational services for those same children.

The close relationship is exemplified by Applicant, who offers both daycare and early educational services. In addition, the record includes websites for seven third party early childhood education and daycare providers (Silverbrook Kindercare, Childtime Learning Centers, Everbrook Academy, La Petite Academy, The Nest Academy, Minnieland Academy, The Fairfax Academy, and School Age Child Care) and so establishes that the same entity commonly provides the relevant services and markets the services under the same mark.<sup>11</sup>

In addition, the record includes six third-party use-based registrations (Registration Nos. 3197306 JUNIORVERSITY, 4613190 PRIMARY PREP ACADEMY, 4631887 GILDEN WOODS EARLY CARE AND PRESCHOOL, 4784467 PRINCETON MONTESSORI SCHOOL, 5378903 THE LEARNING GARDEN, 5741374 F and design) showing the same mark registered for preschool and infant daycare services such as those offered by Applicant, and K-12 educational services (or kindergarten education, or education services unrestricted to any age group which

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"This campus [of Imagine Hope Community Charter School, Lamond Campus] is pre-K through fifth grade with almost 300 students..." (*Id.* at TSDR 49-50).

<sup>11</sup> December 22, 2021 Office Action TSDR 6-49.

we presume to include K-12 education), such as those offered by Registrant.<sup>12</sup> Third-party registrations for services listed in both the application and registration, when based on use in commerce, may have probative value to the extent that they serve to suggest that the listed services are of a type that may emanate from the same source. *See In re I-Coat Co.*, 126 USPQ2d 1730, 1738 (TTAB 2018); *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff'd mem.* 864 F.2d 149 (Fed. Cir. 1988).

The issue is not whether the services will be confused with each other, but rather whether the public will be confused as to their source. *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods.”). Here, the inherent relationship between services devoted to the care and education of young children is augmented by record evidence that the consuming public is exposed to the same mark being used and registered for infant and preschool daycare and K-12 education services, and we find that the services are closely related.

We find the same evidence demonstrates that the channels of trade for Applicant’s and Registrant’s services are closely related. The third-party websites of record show that a single entity uses the same online advertising to appeal to the same parents of children to use the different services of infant and preschool daycare, early childhood

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<sup>12</sup> May 18, 2021 Office Action TSDR 7-24. Applicant provides no legal support for its argument (4 TTABVUE 12-13) that the probative value of these registrations is lessened because only one registered mark includes the word “SCHOOL.”

education, and K-12 education services. In fact, the trade channels overlap to the extent that the record shows that the parents or guardians of a five-year-old may choose between enrolling the child in daycare, preschool, or kindergarten.<sup>13</sup>

Finally, Applicant contends (4 TTABVUE 14) that the sales conditions for the respective services weigh against a likelihood of confusion because parents and guardians “are naturally careful in selecting a caregiver given the tremendous health and safety implicants for the child(ren).” Applicant relies on three articles in online publications regarding the considerable costs of child care (Care.com, World Population Review, Childcare.gov.) and the government brochure “Choosing a School for Your Child” (U.S. Department of Education Office of Innovation and Improvement) to contend that the expense and importance of the education and daycare services offered by Applicant and Registrant require consumers to exercise great care.<sup>14</sup> *See In re Info. Builders Inc.*, 2020 USPQ2d 10444, \*4 (TTAB 2020) (“[I]n light of the inherent nature of the goods and services involved, some degree of purchasing care may be exercised by Applicant’s potential or actual consumers.”). However, given the similarity between Applicant’s IMAGINE mark and the registered IMAGINE SCHOOLS mark, “careful purchasers who do notice the

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<sup>13</sup> Because the same age child may be enrolled in either Applicant’s or Registrant’s services, we deny Applicant’s request (4 TTABVUE 12) that we take judicial notice that “the physical and intellectual needs of children and young adults at K-12 grade levels are undisputedly different than the physical and intellectual needs of infants and young children at the daycare level.” In addition to not being a commonly known fact, the record supports the opposite conclusion: Applicant’s website advertises that its services are available to five-year-old children, stating “We understand that the first five years of a child’s life they have much to learn.” November 17, 2021 Response TSDR 31.

<sup>14</sup> November 17, 2021 Response TSDR 52-74, 138-189.

difference in the marks will not necessarily conclude that there are different sources for the goods, but will see the marks as variations of each other, pointing to a single source.” *In re Hitachi High-Technologies Corp.*, 109 USPQ2d 1769, 1774 (TTAB 2014).

We find that the *DuPont* factors relating to the similarity of the respective services and channels of trade weigh in favor of finding a likelihood of confusion, and the *DuPont* factor relating to the conditions of sale is neutral.

### **C. The Extent of Potential Confusion**

Applicant argues (4 TTABVUE 23) that there “is no [] probability of confusion here, especially as there is no evidence in the record that shows the owner of the Cited Mark operates schools in specific overlapping geographic territories with Applicant’s daycares, which is important because obviously parents and guardians can only send their child(ren) to facilities that are reasonably close to home.” As described above, Applicant seeks geographically unrestricted registrations, and Registrant owns a nationwide registration, which give Registrant presumptive exclusive rights to nationwide use of its mark in connection with the identified services under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b). *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 393 (Fed. Cir. 1983) (“Applicant seeks a geographically unrestricted registration under which it might expand throughout the United States. Under these facts, it is not proper, as the TTAB found, to limit our consideration to the likelihood of confusion in the areas presently occupied by the parties. Section 7(b) of the Trademark Act of 1946, 15 U.S.C. § 1057(b), creates a presumption that the registrant has the exclusive right to use its mark throughout

the United States. Therefore, the geographical distance Serial Nos. 90069213 and 90069574 between the present locations of the respective businesses of the two parties has little relevance in this case.”). The relevant services of both Applicant and Registrant, based on the identification of goods in the respective application and registration, are unrestricted, and may be advertised and offered in the identical market, and so the lack of actual overlap does not limit the extent of potential confusion. We find the twelfth *DuPont* factor is neutral.

#### **D. Balancing the Factors**

We have considered all of the arguments and evidence of record, and all relevant *DuPont* factors. While we recognize the differences between the marks and the services, we find that Applicant’s mark IMAGINE creates the same commercial impression as, and is similar in appearance, meaning and sound to, the registered mark IMAGINE SCHOOLS, for inherently and closely related services which travel in the same channels of trade to ordinary consumers. While we recognize the nature of the services may cause some of those consumers to exercise more than the usual care in choosing the services, this does not outweigh the almost identical marks and closely related services.

**Decision:** The refusal to register Applicant’s mark IMAGINE for the International Class 41 services and “preschooler and infant care at daycare centers, all of the foregoing provided in person at physical facilities and excluding public, independent, and charter schools at the K-12 grade levels and materials related thereto” in International Class 43 is affirmed.

Application Serial No. 90338230 will go forward only as to services which were not the subject of the refusal, namely “Cafeteria services; Restaurant and café services; all of the foregoing provided in person at physical facilities and excluding public, independent, and charter schools at the K-12 grade levels and materials related thereto,” in International Class 43.